No. 18-315

In the Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF COALITION FOR GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Coalition for Government Procurement (Coalition) is a nonprofit, nonpartisan organization comprising small, medium, and large commercial contractors that sell products and services to the federal government. The Coalition has over 200 member companies covering a wide variety of industries. Its members include many of the top federal contractors and collectively account for a significant percentage of the sales generated through General Services Administration (GSA) and Department of Veterans Affairs contracts, including those awarded through the Multiple Award Schedules (MAS) program. According to the GSA website, MAS contracts alone are responsible for $45 billion in annual spending, representing approximately 10 percent of overall federal spending. Coalition members are also responsible for many other commercial items purchased annually by the federal government through other contractual mechanisms. The Coalition has been active for more than 35 years in bringing together public- and private-sector procurement leaders to work toward the mutual goal of common-sense acquisition.[1]

Various Coalition members have been subject to actions under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, brought both by relators and by the Government. The decision below exposes them to significant litigation risk by allowing relators to bring actions based on events that are up to a decade old. The

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[1]Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

Coalition therefore has a strong interest in how this Court interprets the FCA's statute of limitations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). In addition to treble damages, defendants are subject to civil penalties. *Id.* § 3729(a)(1). The penalties for FCA violations are significant. In 2017, the range of penalties nearly doubled—from $5,500-$11,000 to a new range of $10,781-$21,563 *per claim*. See Civil Monetary Penalties Inflation Adjustment for 2017, 82 Fed. Reg. 9131 (Jan. 3, 2017) (codified at 28 C.F.R. § 85.5). For contractors that are subject to numerous detailed statutes, regulations, and clauses, and that also submit numerous requests for payment to the Government over the course of contract performance, these penalties can be severe.

There are two mechanisms for bringing an FCA action. Section 3730(a) authorizes the Attorney General to investigate violations of Section 3729 and to bring civil fraud actions. Section 3730(b) allows private plaintiffs, also known as relators, to bring civil actions for violations of Section 3729 "in the name of the Government." The relator must file his or her complaint under seal, affording the Government the opportunity to investigate the allegations. 31 U.S.C. § 3730(b)(2). The Government may elect to intervene or may allow the relator to proceed independently, with the option to intervene or move to dismiss at a later junction. *Id.* § 3730(b)(4), (c). Without regard to whether the Government intervenes, a successful relator can recover attorneys' fees. 31 U.S.C. § 3730(d)(1), (2).

The FCA also includes two distinct statute-of-limitations periods. Section 3731(b)(1) provides that no civil action may be brought "more than 6 years after the date on which the violation of section 3729 is committed." Alternatively, Section 3731(b)(2) provides that no civil action may be brought

> more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed.

According to the prefatory phrase in Section 3731(b), both limitations apply to "[a] civil action under section 3730."

In the decision below, the Eleventh Circuit concluded that Section 3731(b)(2) applies to relators, even in cases in which the Government declines to intervene, on the basis of this prefatory phrase and the fact that the whistleblower provision is codified in Section 3730. Pet. App. 13a-14a. That conclusion is mistaken.

As this Court has explained, the FCA is "complex" and Section 3731(b) does not apply to "all actions under § 3730." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 417 (2005). As in the *Graham County* case, it would be "counterintuitive" (*id.* at 421) for the limitation period *for the relator* to begin to run at the time the relevant *government official* learns (or should learn) about the facts material to the alleged FCA violation. Under the Eleventh Circuit's view, the limitation period could be tolled despite the relator's knowledge if the Government did not learn of the material facts independently

of the relator. Or, conversely, the limitation period could begin to run without the relator's knowledge if the Government learned some of those facts independently of the relator. Either result would defeat the purpose of statutes of limitations, which is to regulate the behavior of the person filing the suit and to encourage plaintiffs to bring actions promptly.

Extending the limitation period up to 10 years would impose significant costs on defendants. Relators initiate about 85 percent of FCA cases, and the Department of Justice (DOJ) intervenes in only about 20 percent of these. Applying Section 3731(b)(2) to relators, therefore, would triple the number of suits subject to the lengthy 10-year tolling provision, from approximately one third of FCA actions to all of them.

Allowing relators to benefit from Section 3731(b)(2) would impose particularly high costs on government contractors. Government contracts are comprehensively regulated and include a multiplicity of complex provisions. Many of the legal requirements for government contracts present significant compliance challenges. For instance, government contractors are frequently required to certify that all aspects of contract performance—including aspects handled by subcontractors and lower-tier suppliers—fully comply with all applicable requirements. Although this Court has sought to allay "concerns about fair notice and open-ended liability" by emphasizing the strict application of the scienter and materiality requirements, numerous FCA actions alleging "garden-variety breaches of contract or regulatory violations" continue to be filed. *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2002-2003 (2016). Applying the 10-year limitation period to

all FCA actions would magnify the litigation risk of government contracting.

Applying Section 3731(b)(2) to relators would also undermine government procurement policy. In recent years, Congress and Executive-branch procurement officials have attempted to promote access to commercial technology and technical innovation by reducing regulatory burdens and by creating a more favorable environment for "nontraditional" businesses to enter the government market. Extending the reach of Section 3731(b)(2) would subvert these efforts by further increasing the risks of government contracting.

ARGUMENT

A. The Tolling Provision Of Section 3731(b)(2) Applies To Relators Only When The United States Intervenes

The Eleventh Circuit held that the phrase "civil action under section 3730" includes all whistleblower FCA actions, reasoning that the *qui tam* provision is codified in Section 3730 and "nothing in § 3731(b)(2) says that its limitations period is unavailable" to relators in cases in which the Government has not intervened. Pet. App. 14a. On this point, the Eleventh Circuit agreed with the Ninth Circuit, which has characterized this prefatory phrase in 31 U.S.C. § 3731(b) as "clear and unambiguous." *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996). That view is inconsistent with the statutory text, history, purpose, and policy, as well as with precedent of this Court.

This Court squarely rejected the argument that "civil action under section 3730" is unambiguous in *Graham County*, which held that that term does not include civil actions for retaliation, even though such

actions are codified in Section 3730(h). 545 U.S. at 412. The Court identified anomalies that made the "literal text" of Section 3731(b) "ambiguous." *Id.* at 417. The Court noted, for example, that it would be "counterintuitive" to find Section 3731(b) applicable to retaliation claims because the limitation period is triggered by a "'violation of section 3729,'" which is an element of an FCA claim but not of a retaliation claim. 545 U.S. at 416-417 (quoting 31 U.S.C. § 3731(b)(1)).

The Eleventh Circuit's assertion that nothing in Section 3731(b)(2) precludes the application of the tolling provision to relators is equally flawed. Notably, the limitation period in that provision starts when the relevant "official of the United States" learns or should learn about "facts material to the right of action." As Judge Wilkinson has pointed out, this trigger "makes perfect sense when referring to an action brought by the government" but "makes no sense whatsoever" when applied to a relator's action, because the government's knowledge "does not notify the relator of anything." *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 294 (4th Cir. 2008). As a consequence, "that knowledge cannot reasonably begin the limitations period for a relator's claims." *Id.*

This view is consistent with the basic purpose of statutes of limitations, which is to "ensur[e] essential fairness to defendants" by "barring a plaintiff who has slept on his rights." *Am. Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 554 (1974) (internal quotation marks omitted). The Eleventh Circuit's view is *not* consistent with that purpose. In this connection, it is irrelevant that "the United States remains the real party in interest," as the court below observed (Pet. App. 19a), because the purpose of a statute of limitations is to

regulate the behavior of the person bringing the suit—in this circumstance the relator.

There is another textual reason why the Eleventh Circuit's decision is erroneous. The phrase "responsibility to *act*" in Section 3731(b)(2) refers back to the prefatory phrase describing the responsibility of the relevant DOJ official in the Civil Division to bring "[a] civil *action* under section 3730." This is consistent with the view of numerous courts that "the only government 'official . . . charged with responsibility to act' under the FCA is the Attorney General (or his designee within DOJ)." *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 608 (S.D.N.Y. 2013); see *id.* at 607 (citing cases). As Judge Wilkinson has explained, once this "government official" discovers facts supporting an FCA cause of action, his or her responsibility is "to see that the government brings or joins an FCA action within the limitations period," not "to ensure that a relator brings a timely FCA action." *Sanders*, 546 F.3d at 294.

There is more. When Congress enacted Section 3731(b)(2), it borrowed, almost verbatim, language in 28 U.S.C. § 2416(c), which tolls the general statute of limitations for civil actions brought *by the United States* until "facts material to the right of action" are actually or constructively known by an "official of the United States charged with responsibility to act under the circumstances." It is implausible that Congress intended to apply a provision that tolls civil actions brought by the Government to FCA actions brought by relators. That is especially true when one considers that Congress imposed numerous special procedural requirements on relators in Section 3730(b) that are not imposed on the Government in Section 3730(a).

Since the two types of actions are treated so differently, it can hardly be thought unusual for them to have distinct statutes of limitations.

Finally, in assessing whether the Eleventh Circuit's interpretation is correct, it should be borne in mind that 10 years is an extraordinarily lengthy limitation period for a civil action. For instance, the limitation period for fraud claims brought *by the Government* under the Contract Disputes Act of 1978, 41 U.S.C. § 7101 *et seq.*, is 6 years. See 41 U.S.C. § 7103(a)(4). The general statute of limitations for federal civil-penalty actions, 28 U.S.C. § 2462, is only 5 years, and it is not subject to a discovery rule for actions sounding in fraud. See *Gabelli v. S.E.C.*, 568 U.S. 442, 454 (2013). As for the fallback statute of limitations for civil actions arising under an Act of Congress enacted after December 1, 1990, it is only 4 years. 28 U.S.C. § 1658(a). These much shorter limitation periods make it unlikely that Congress would have intended to enact a 10-year limitation period for *all* FCA actions alleging a violation of Section 3729, in the great majority of which the Government is not even a party.

B. Extending The Statute Of Limitations To A Period Of Up To 10 Years Would Impose Significant Costs On FCA Defendants In General And Government Contractors In Particular

1. Allowing relators to extend the statute of limitations from 6 years to a maximum of 10 would have far-reaching consequences for all defendants. A large majority of FCA suits are filed by relators. Between fiscal year (FY) 2014 and FY 2018, relators filed an average of 677.6 FCA actions per fiscal year, or 84.32 percent of all such actions. See U.S. Dep't of Justice,

Civil Division, Fraud Statistics—Overview 1 (Dec. 21, 2018) (Fraud Statistics—Overview), https://tinyurl.com/y7r99qe5. In FY 2018, 645 of 767 FCA suits (84 percent) were filed by relators. *Id.*

The Government elects to intervene in relators' FCA suits only about 20 percent of the time. See, *e.g.*, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), https://tinyurl.com/77lht9k.[2] That means that approximately 67 percent of all FCA actions are *qui tam* actions in which the Government does *not* intervene. If relators were always allowed to invoke Section 3731(b)(2), defendants would be subject to three times the number of suits with a maximum limitation period of 10 years as they would be if relators in actions with no Government intervention were limited to the 6-year period in Section 3731(b)(1) (100% as opposed to approximately 33%).

The Government has stated that a decision not to intervene may be based on factors other than merit. See, *e.g.*, Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, on Factors for Evaluating Dismissal Pursuant to 31

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[2] Data released in response to a Freedom of Information Act request are consistent with this estimate and indicate that DOJ's rate of intervention has been declining in recent years, with an average intervention rate of 23.4 percent for the 10-year period between 2005 and 2014 and an average intervention rate of 22.4 percent for the 5-year period between 2010 and 2014. See Comment, Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. CHI. L. REV. 1559, 1563–1564 (2015).

U.S.C. § 3730(c)(2)(A) (Jan. 10, 2018), https://tinyurl.com/ycdd7tzr. But the disparity in recoveries from "intervened" and "non-intervened" FCA suits suggests otherwise. Between FY 2014 and FY 2018, an average of only 6.91 percent of recoveries came from non-intervened *qui tam* suits. Fraud Statistics—Overview at 1.

It is likely for this reason that courts often take into account the Government's intervention decision in assessing the materiality of a relator's allegations. See, *e.g.*, *United States* v. *Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir. 2017) (noting that the Government "immediately intervened" and finding allegations material); *United States ex rel. Petratos* v. *Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (noting that "in those six years, [DOJ] has taken no action against [defendant] and declined to intervene" and finding allegations immaterial). There is no question, therefore, that allowing relators to invoke Section 3731(b) will expose defendants to greater risk of being subject to meritless *qui tam* actions.

FCA actions that are eventually dismissed or withdrawn can impose significant costs on contractors, such as legal fees (including attorney's fees and discovery expenses), costs associated with internal investigations or investigations initiated by the Government that are abandoned, and reputational harm. These costs would all be enhanced by extending the statute of limitations to a period of up to 10 years for *qui tam* suits in which the Government does not intervene.

2. Allowing relators to extend the statute of limitations from 6 years to a maximum of 10 is harmful to all defendants, but it is uniquely detrimental to government contractors. In FY 2017, the Government recovered approximately $220 million in settlements

and judgments from Department of Defense (DoD) contractors. U.S. Dep't of Justice, Civil Division, Fraud Statistics—Department of Defense 2 (Dec. 19, 2017), https:// tinyurl.com/y9h3fy5f. Although healthcare fraud is the largest source of recoveries, the FCA has an outsized impact on government contractors because it imposes risks of investigation, litigation, and reputational injury that go well beyond actual settlements and judgments.

Government contracting is different from commercial contracting in many fundamental respects. Since they are financed with funds from the public fisc, government contracts are highly regulated. In addition to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 1.000 *et seq.*, and agency FAR supplements, contractors are subject to numerous enforcement statutes and regulations that are unique to the Government. Aside from the FCA, these include cost or pricing provisions such as the Truth in Negotiations Act, 10 U.S.C. § 2306a & 41 U.S.C. § 3501 *et seq.*[3]; various anti-kickback[4] and anti-bribery[5] statutes; domestic-

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[3] The Truth in Negotiations Act requires certain contractors (in negotiated, or non-commercial, procurement actions exceeding $750,000) to disclose "cost or pricing data"; to certify that the data are accurate, complete, and current; and to lower their prices to reflect any price increase caused by a defective disclosure. 10 U.S.C. § 2306a. These requirements apply to all contracts that are priced or performed on the basis of cost.

[4] The Anti-Kickback Act of 1986, 41 U.S.C. § 8701 *et seq.*, prohibits government contractors from accepting or soliciting bribes or kickbacks from businesses seeking a subcontracting contract.

[5] For example, federal law prohibits any person, including a contractor, from directly or indirectly giving, offering, or promising anything of value to agency officials for or because of any official

preference statutes like the Buy American Act, 41 U.S.C. § 8301 *et seq.*[6]; various regulations prohibiting the use of foreign counterfeit parts[7]; recently promulgated cybersecurity rules[8]; and more.

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act performed or to be performed by such official. 18 U.S.C. § 201(c)(1)(a).

[6] The Buy American Act requires the U.S. government to purchase only "unmanufactured articles, materials, and supplies" that "have been mined or produced in the United States" and only "manufactured articles, materials, and supplies" that have been manufactured in the United States "substantially all" from U.S. components, unless doing so is "inconsistent with the public interest" or would result in "unreasonable" cost. 41 U.S.C. §§ 8302(a)(1), 8303(a)-(b).

[7] DoD procurement regulations require government contractors to obtain electronic parts from the original manufacturer or an authorized aftermarket manufacturer, if possible. Contractors are obligated to vet contractor-approved suppliers and to "assume[] responsibility for the authenticity of the parts provided" by them. See Defense Federal Acquisition Regulation Supplement: Detection and Avoidance of Counterfeit Electronic Parts—Further Implementation, 81 Fed. Reg. 50,635 (Aug. 2, 2016).

[8] For instance, in 2016 the FAR was amended to include a new subpart and contract clause governing basic safeguarding of contractor information systems that process, store, or transmit federal contract information. Federal Acquisition Regulation: Basic Safeguarding of Contractor Information Systems, 81 Fed. Reg. 30,439 (May 16, 2016) (codified at 48 C.F.R. subpt. 4.19 and 48 C.F.R. § 52.204-21). Later in 2016, the National Archives and Records Administration issued a final rule for managing controlled unclassified information. Controlled Unclassified Information, 81 Fed. Reg. 63,324 (Sept. 14, 2016) (codified at 32 C.F.R. Part 2002). Also in 2016, DoD promulgated a final rule on contractor reporting of network penetrations and DoD policies and procedures regarding purchases of cloud computing services. Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services (DFARS Case 2013-D018), 81 Fed. Reg. 72,986 (Oct. 21, 2016) (codified at

Many of these statutes and regulations require government contractors to "flow down" provisions to suppliers and to police their supply chains to address concerns about source of origin, counterfeit parts, and cybersecurity, among other things. In our modern, globalized economy, in which many companies have far-flung, international supply chains, these requirements can impose enormous costs and compliance risks. Even with sophisticated internal controls and compliance systems, for instance, a contractor may be slow to learn that one of its subcontractors has changed its sourcing and is now in violation of one of these requirements.

Under the precedent set by this Court in the *Escobar* case, government contractors implicitly certify compliance with *all* regulatory requirements that are material to payment. 136 S. Ct. at 1999. This regulatory thicket imposes enormous FCA risks on government contractors, as there is no foolproof way of guessing in advance which of the litany of requirements might be found material in the event of a lawsuit. Allowing relators up to 10 years to file suit would only magnify this litigation risk.

Although *Escobar* emphasized that the FCA is "not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations" (136 S. Ct. at 2003 (internal quotation marks and citation omitted)), relators persist in pursuing such claims against government contractors and other recipients of federal funds—even in the face of opposition from the responsible regulatory agency.

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48 C.F.R. subpt. 204.73 and 48 C.F.R. § 252.204-7008 and -7012). Notably, all of these provisions apply to contracts for commercial goods and services, with the exception of contracts solely for the acquisition of commercial off-the-shelf items.

For example, in 2015 a federal district court in Texas awarded more than $660 million in damages to a relator based on the defendant's purportedly inadequate disclosures about its guardrail design to the Federal Highway Administration (FHWA). *United States ex rel. Harman* v. *Trinity Indus. Inc.*, 872 F.3d 645, 652 (5th Cir. 2017). Although FHWA—the government agency with regulatory responsibility for the underlying issue—consistently supported the defendant and issued a memorandum shortly before trial stating that it had "validated" the safety of the defendant's guardrails, the court allowed the case to proceed to trial. *Id.* at 650. While the defendant ultimately prevailed on appeal, *id.* at 650-51, it did so only after years of litigation, which caused it to incur millions of dollars in attorneys' fees and business losses.[9]

Relators also continue to pursue claims based on legal theories that are inconsistent with the conduct of the relevant regulatory agency at the time of the events at issue. For instance, in *United States ex rel. Campie* v. *Gilead Sciences Inc.*, 862 F.3d 890 (9th Cir. 2017), cert. denied, 2019 WL 113075 (Jan. 7, 2019), two former employees alleged that Gilead Sciences, a pharmaceutical company, made false statements in the course of obtaining Food and Drug Administration (FDA) approval for several HIV drugs, for which the

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[9] The legal costs incurred by Trinity Industries have not been made public, but the district court awarded the relator nearly $19 million in attorneys' fees in 2015. Litigation continued through September 2017, and the defendant had a larger legal team than the relator, so the fees it incurred were likely considerably higher. See Mark Curriden, *Fight or settle? Dallas' Trinity Industries taking big chance in court to save face and massive fine*, DALLAS MORNING NEWS, Oct. 2016, https://www.dallasnews.com/business/business/2016/10/28/trinity-industries-goes-win.

company later sought reimbursement through federal programs such as Medicare and Medicaid. *Id.* at 896–898. In the Ninth Circuit appeal, the company pointed out that the FDA was aware of the alleged regulatory violations for years and never retracted its approval or ordered that distribution of the drugs be halted. At all times relevant to the relators' claims, moreover, the government customers consistently paid for the drugs at issue and never sought a refund. *Id.* at 904-907. Nevertheless, the Ninth Circuit reversed the district court's dismissal of the case. After Gilead Sciences petitioned for certiorari, this Court invited the Solicitor General to file an *amicus curiae* brief, in which DOJ belatedly conceded that the relator's allegations were meritless, as the agency had already investigated the claims, and announced its intention to exercise its authority under 31 U.S.C. § 3730(c)(2)(A) to unilaterally dismiss the case upon remand. Brief for United States as *Amicus Curiae* at 15-16, *Gilead Sciences Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Nov. 30, 2018), 2018 WL 6305459, at *15-16.

Finally, in addition to increasing FCA litigation risk, lengthening the limitation period would impose enormous record-keeping burdens on government contractors. Pursuant to FAR 4.703, 48 C.F.R. § 4.703, for example, contractors are generally required to retain records for a period of up to 3 years after final payment. Disposing of records could leave a contractor unprepared if it were surprised by an FCA suit filed many years later, such as the one by the relator here. Applying Section 3731(b)(2) to relator suits in which the Government has not intervened would thus further raise the administrative costs of performing government contracts and deter companies from government work. While it is true that the Government is covered by Section 3731(b)(2) whether or not relators

are, an FCA action initiated by the Government typically arises in connection with an existing audit, investigation, or dispute, and therefore will be less likely to come as a surprise than a meritless *qui tam* suit in which the Government does not intervene.

C. Applying Section 3731(b)(2) To Relators Would Undermine Government Policy And Interfere With Agency Procurements

Over the past 25 years, Congress and the acquisition community have been engaged in an ongoing effort to promote and facilitate public contracting with commercial companies that possess or are developing new technologies and services that do not have a long history in government contracting. In the early 1990s, for example, policymakers recognized that the growing complexity and scope of contract clauses and regulations were imposing significant costs and regulatory risks that discouraged commercial companies with important technologies or critical knowledge and skills from working with the Government. To address these problems, Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355.

FASA established a statutory preference for the acquisition of "commercial items" (including not only physical items but also services). 10 U.S.C. § 2377(a); 41 U.S.C. § 3307(b). It also sought to reduce and minimize the number of contract clauses mandated by statute and regulation. Initially, this effort was successful—in 1996, FAR 30-5, 48 C.F.R. § 52.212-5 (1996), included only 17 clauses based on provisions of law or executive orders, only 5 clauses based on executive orders that applied specifically to services, and

only 5 that flowed down to subcontractors. But following a proliferation of executive orders and other laws in the past decade, the number of clauses in these three categories has increased to 60, 10, and 19, respectively. See FAR 52.212-5(b), (c), (e), 48 C.F.R. § 52.212-5(b), (c), (e).

In part to counteract this trend, Congress recently has encouraged agencies within DoD to use non-procurement contracting mechanisms to expedite access to commercial technology and resources. One example is the expansion and promotion of "other transaction authority" (OTA) as an approach to acquire technology and resources not otherwise available to the Government. In contrast with traditional "procurement contracts," OTA transactions are not subject to the FAR and its supplements, the Cost Accounting Standards, 48 C.F.R. § 30.000 *et seq.*, the Truth in Negotiations Act, the Buy American Act, the Bayh-Dole Act, Pub. L. No. 96-517, and numerous other onerous procurement requirements. See, *e.g.*, L. Elaine Halchin, *Other Transaction (OT) Authority*, Congressional Research Service, July 15, 2011, at 19-21, https://tinyurl.com/y8tdu8ub. This flexible OTA approach has been used by the National Aeronautics and Space Administration since the enactment of the National Aeronautics and Space Act of 1958. Pub. L. No. 85-568, § 203(b)(5)-(6). In the National Defense Authorization Act (NDAA) for FY 1994, Congress authorized the Defense Advanced Research Project Agency to use OTA agreements for the prototyping of weapons systems. Pub. L. No. 103-160, § 845.

In the years that followed, Congress repeatedly expanded the use of OTA agreements for defense procurements. In the NDAA for FY 1997, for example, Congress extended the use of OTA to all agencies

within DoD. Pub. L. No. 104-201, § 804. In the FY 2002 NDAA, Congress sought to streamline the use of OTA instruments and to make them more attractive to industries by authorizing the use of sole-source, follow-on agreements for prototype OTA agreements. Pub. L. No. 107-107, § 822. In the FY 2015 NDAA, Congress expanded the use of prototype OTA agreements beyond weapons systems, authorizing DoD to use OTA for any prototype project that is directly relevant "to improvement of platforms, systems, components, or materials in use by the armed forces." Pub. L. No. 113-291, § 812. In the FY 2016 NDAA, Congress made DoD's authority permanent, codifying it in Section 2371b of Title 10. Pub. L. No. 114-92, § 815. This provision also included a requirement to use "nontraditional defense contractors," small businesses, cost-sharing, or "innovative business arrangements or structures" such as consortia. *Id.* Finally, in the FY 2018 NDAA, Congress increased the dollar thresholds for approvals of OTA agreements by DoD officials. Pub. L. No. 115-91, § 864.

Notwithstanding this effort to encourage innovation through the use of more lightly regulated OTA agreements, one of the most significant barriers to attracting technology companies to government work is the threat of FCA litigation. The FCA applies to government expenditures regardless of the form of the instrument and thus covers OTA agreements.[10] Allowing relators to file FCA actions as long as 10 years from the time of any alleged violation would further

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[10] DoD OTA is codified in Chapter 138 (Research and Development) of Title 10 and is not subject to most rules governing "procurement contracts," which are codified in Title 41 or in Chapter 137 ("Procurement Generally") of Title 10. OTA contracts are subject to the FCA, however, and to many fiscal laws like the Anti-Deficiency Act, which are codified in Title 31.

discourage technology companies, commercial companies, and nontraditional contractors from accepting business with U.S. agencies. It may also encourage firms that have already accepted government work to reassess their risk profile and pull back from the government market.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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